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09/630,595	08/01/2000	Scott W. Rau	47004.000049	5920

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EXAMINER

FISCHER, ANDREW J

ART UNIT

PAPER NUMBER

3627

DATE MAILED: 08/29/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.
09/630,595

Applicant(s)
Rau et al

Examiner
Andrew J. Fischer

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3627



-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on Aug 16, 2002.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 11-25 is/are pending in the application.
- 4a) Of the above, claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 11-25 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claims _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on Aug 1, 2000 is/are a) ☐ accepted or b) ☒ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
*See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____ 6) ☐ Other:

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DETAILED ACTION

Acknowledgments

1. The amendment filed August 16, 2002 (Paper No. 11) is acknowledged. Accordingly, claims 11-25 remain pending.

Drawings

2. The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. No new matter allowed. The following must be shown or the features canceled from the claim(s):

- a. The "point of sale" as recited in claim 1.
- b. The "transaction card" as recited in claim 24.
- c. The "key" as recited in claim 25.

A proposed drawing correction or corrected drawings are required in reply to this Office action to avoid abandonment of the application. The objections to the drawings will not be held in abeyance.

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Claim Rejections - 35 USC § 101

3. 35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

4. Claims 12-14, 16, 17, 20, and 22-25 are alternatively rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter. The claims are directed to neither a “process” nor a “machine,” but rather embraces or overlaps two different statutory classes of invention. See MPEP §2173.05(p) II or *Ex Parte Lyell*, 17 USPQ2d 1548 (B.P.A.I., 1990).

Claim Rejections - 35 USC § 112 1st Paragraph

5. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

6. Claims 24 and 25 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventors, at the time the application was filed, had possession of the claimed invention.

If Applicants can point to a specific disclosure of the transaction card and key, the rejections will be withdrawn.

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Claim Rejections - 35 USC § 112 2nd Paragraph

7. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the Applicant regards as his invention.

8. Claims 11-25 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention. The claims are replete with errors. Some examples follow:

a. In claim 11, the phrase “point of sale” as recited in line 2 remains indefinite.

Claim 13 recites a connection to a point of sale device. Because of the doctrine of claim differentiation and because Applicants recites “a point of sale device” in claim 13, claim 13's “point of sale device” must be different from claim 1's “point of sale”

According to claim 1, it appears Applicants intend “point of sale” to be the general vicinity of the point of sale device. Therefore the receiver is coupled to the transponder in the general vicinity of the point of sale. What constitutes the area of the point of sale remains indefinite.

b. Claims 12-14, 16, 17, 20, and 22-25 are each indefinite because they fail to recite any additional method steps. While the claims need not recite all of the operating details, a method claim should at least recite a positive, active step. *Ex parte Erlich*, 3 USPQ2d 1011, 1017 (B.P.A.I. 1987) (citations omitted).

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Claim Rejections - 35 USC § 102

9. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States. . . .

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the Applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the Applicant for patent.

10. Claims 11-25, as understood by the Examiner, are rejected under 35 U.S.C. 102(b) as being anticipated by Swartz et. al. (U.S. 5,923,735). Swartz et. al. discloses: a point of sale terminal (1 or 72) coupled to a transponder (via antenna 8); communicating and connecting to at least one network enabled transaction device (73); the wireless interface is a RF interface (a cellular network); the point of sale device is an electronic sale register (72 carried by the customer; there as an additional electronic sale register “checkout register” operated by an cashier which receives the information from the handheld unit—see “Summary of the Invention” in columns 3-4); accounting information (e.g. price of item) including account balance (customer’s total) is stored in the system; the transponder is embedded in a personal article (inherent); the system communicates with a data processing facility to execute a transaction (the store’s computer 73 or an additional inherent system for processing a credit card transactions);

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the account subscriber registers the transponder (the unit has to log on and be recognized by the system when entering the store); and the system operates with a transaction server.

11. Claims 11-25, as understood by the Examiner, are alternatively rejected under 35 U.S.C. 102(e) as being clearly anticipated by Katz (U.S. 6,327,575 B1). See Figure 4.

12. For due process purposes, the Examiner notes Applicants have declined the Examiner's express invitation¹ to be their own lexicographer by indicating and defining claim limitations to have meanings other than their ordinary and accustomed meanings. Accordingly, for the remainder of the ex parte examination process, the presumption in favor of the ordinary and accustomed meaning is maintained and is now made final. The claims are therefore interpreted with their "broadest reasonable interpretation" *In re Morris*, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997).² The Examiner now relies extensively on this interpretation.

Response to Arguments

13. Applicants' arguments filed August 16, 2002 (Paper No. 11) have been fully considered but they are not persuasive.

¹ See the Examiner's previous Office Action mailed May 16, 2002, Paper No. 10, Paragraph No. 13.

² See also MPEP §2111; *In re Graves*, 69 F.3d 1147, 1152, 36 USPQ2d 1697, 1701 (Fed. Cir. 1995); *In re Etter*, 756 F.2d 852, 858, 225 USPQ 1, 5 (Fed. Cir. 1985) (en banc).

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14. Regarding the objection to the drawings, because Applicants' arguments have introduced additional uncertainty as to what constitutes the "point of sale" as recited in claim 1. The Examiner respectfully requests Applicants to explicitly point out in the drawings (including reference number) what constitutes the "point of sale"

15. Applicants argue "Swartz does not anticipate claims 11-25 because Swartz does not disclose using a transponder to execute a transaction at a point of sale." Even if Swartz does not disclose the invention as Applicants assert (which the Examiner does not concede), the Examiner has carefully reviewed the claims and can not locate "using a transponder to execute a transaction at a point of sale" in the claims. Clearly figure 1 discloses at least one networked enabled transaction device with a transaction interface.

As Judge Clevenger has so eloquently summarized these types of arguments, "The invention disclosed in ... [Applicants'] written description may be outstanding in its field, but the name of the game is the claim." *In re Hiniker Co.*, 150 F.3d 1362, 1369, 47 USPQ2d 1523, 1529 (Fed. Cir. 1998).

16. Applicants additionally argue "Swartz does not disclose the storing of account information" The Examiner respectfully disagrees. Swartz directly discloses that "the customer's ID" and "required security measures" are stored in the handheld unit (column 3, lines 55-60). It is the Examiner position that the customer's account information is inherent in these features. How else would the store identify the customer's handheld unit?

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17. Applicants additionally argue “(2) Swartz does not disclose the transponder being engaged in forms of personal items other than cellular phones[.]” The examiner asserts that the device shown in figure 1 is a personal article. In fact, customer may even take the article home. In this sense, the item is “personal” to each individual shopper. Under the “broadest reasonable interpretation” noted above, clearly, Swartz’s 1 is a personal article.

18. Applicants also argue “(3) Swartz does not disclose communication between the system and data processing facility to execute the transaction.” Again, it is the Examiner position that 79 could be the data processing facility. Alternatively, the data processing facility could be the store computer or a credit card system which is inherent in Swartz.

19. The Examiner notes Applicants remarks reiterate the two embodiments as shown in figures 1 and 2. The Examiner also notes that while the two embodiments were originally subject to an election of species requirement (Paper No. 8, Paragraph No. 4), the election of species was withdrawn by the Examiner (Paper No. 10, paragraph No. 2) because the “species are not patentably distinct.”

For due process purposes, it is extremely important to note that Applicants have not traversed the Examiner’s position on the Election of Species. Because Applicants have not traversed the Examiner on this matter, Applicants’ silence is deemed an admission that the Species depicted in the embodiments represented by figures 1 and 2 are not patentably distinct.

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Additionally, the Examiner again notes that Applicants' arguments that the species are patentably distinct will cause the reinstatement of the Election of Species ordinarily set forth in the very first Office Action (Paper No. 8).

ISSUE: *Must Method Claims Recite at Least One Method Step?*

20. Applicants argue that there is no requirement that a dependent claim recite additional method steps. It is the Examiner's principle position that there is a requirement that a dependent claim recite additional method steps. To the extent that a reviewing body finds that this requirement does not currently exist, it is the Examiner alternative position that the issue is of first impression and hereby establishes the requirement.

Background

21. Clearly "A claim may be written in independent or, if the nature of the case admits, in dependent . . . form." 35 U.S.C. 112 3rd paragraph (1975). Additionally, 35 U.S.C. 112 4th paragraph (1975) states:

Subject to the following paragraph, a claim in dependent form shall contain a reference to a claim previously set forth *and then specify a further limitation of the subject matter claimed*. A claim in dependent form shall be construed to incorporate by reference all the limitations of the claim to which it refers.
[Emphasis added.]

22. The Examiner notes that 35 U.S.C. 101 defines four categories of inventions that Congress deemed to be the appropriate subject matter of a patent; namely, processes, machines,

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manufactures and compositions of matter. See 35 U.S.C. §101 (1994). The latter three categories define “things” (or products) while the first category defines “actions” (i.e., inventions that consist of a series of steps or acts to be performed).

In other words, products may be either machines, manufactures, or compositions of matter. MPEP §2106 IV B. 2 (a). And processes may be a process art, or method. See 35 U.S.C. §101 (1994) (“Whoever invents or discovers any new and useful process . . . may obtain a patent therefor.”); and 35 U.S.C. § 100(b) (1994) (“The term ‘process’ means process, art or method . . .”).

23. In our case, because independent claim 11 begins “A method” the claims are clearly process claims.

It is the Examiners factual determination that claims 12-14, 16, 17, 20, and 22-25 do not recite any additional method steps. Since the same arguments apply for claims 12-14, 16, 17, 20, and 22-25, the Examiner will only focus on claim 12, it being representative of all claims 12-14, 16, 17, 20, and 22-25.

24. It is the Examiner’s principle position that because §112 4th paragraph statutorily requires Applicants to “specify a further limitation of the subject matter claimed,” Applicants’ dependent claim must further limit their method. Applicants at their own discretion have chosen the subject matter of claim 1 to be within the statutory class of a “process” or “method.” Therefore, Applicants’ dependent claim 12 must further limit their claimed method.

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This is not to say that a dependent claim may never switch statutory categories. Where it is clear the dependent claim switches to another §101 patentable subject matter category, the dependent claim is treated as belonging only to that category. See MPEP 2173.05(f).

Furthermore, it is the Examiner's position that an independent method claim would be indefinite if it failed to recite at least one method step. Therefore, the Examiner asserts that all method claims must recite at least one method step or be indefinite under §112 2nd paragraph.

Additionally, "The process of patent prosecution is an interactive one." *Morris*, 127 F.3d at 1054, 44 USPQ2d at 1028. The burden placed on Applicants to recite at least one method step within each method claim is small when compared with the public's benefit of having claims which distinctly point out and distinctly claim the subject matter which Applicants regard as their invention.³

³ For example, claim 12 may easily be rewritten as follows: "The method of claim 11 where the step of communicating with at least one network-enabled transaction device via wireless interface comprises communicating with at least one network-enabled transaction device via at least one of an RF interface and an infrared interface." In the age of word processing programs, all the dependent method claims rejected under §112 2nd paragraph for lack of a method step can very easily be drafted to include at least one method step. If Applicants need help in this matter, the Examiner offers his assistance in a telephonic or other interview.

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Examiner's First Alternative Argument: the Dependent Claims are Product Claims

25. It is worth reiterating that as discussed above, all claims are either product claims or process claims. Since claim 12 does not recite a method step, its limitations indicate it must therefore be a product claim. Claim 12 being a product claim, §101 and §112 2nd paragraph rejections result since claim 12 is a hybrid claim without falling into one of the narrowly crafted judicial exceptions. See MPEP §2173.05(p) II for a discussion of hybrid claims.

26. To support his position that claim 12 is a product (and hybrid) claim, the Examiner directs Applicants' attention to the patentable weight of the elements within claim 12. First, the Examiner is well aware of "All Elements Test." In other words, "The Patent and Trademark Office (PTO) must consider all claim limitations when determining patentability of an invention over the prior art." *In re Lowry*, 32 F.3d 1579, 32 USPQ2d 1031, 1034 (Fed. Cir. 1994). The Examiner recognizes that the elements in claim 12 must therefore be considered in some sense.

However, the Examiner reminds Applicants that "it is generally the rule that patentability of a method claim must rest on the method steps recited, not on the structure used, unless that structure affects the method steps." *Leesona Corp. v. US*, 530 F.2d 896, 908 (US Ct Clms 1976). It is also worth noting that the term "claim" in *Leesona* is singular and not plural. *Leesona* implicitly states that patentability of "a method claim" must rest on the method recited unless the structure affects the method steps recited. If no method is recited, this relational analysis between structure and method recited can not occur for a given claim.

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Additionally, “To be entitled to such [patentable] weight in method claims, the recited structural limitations therein must affect the method in a manipulative sense” *Ex Parte Pfeiffer*, 135 USPQ 31, 33 (B.P.A.I. 1961). How can the Examiner assess whether or not the recited structure affects the method in a manipulative sense if the claim fails to recite *any* method steps? It is only when the method claim recites at least one step can the structural limitations be analyzed to determine if they affect the claimed method in a manipulative sense.

Finally, the Examiner notes that the dependent claim 12 indicates Applicants desire to claim a process yet the body of the claim indicates Applicants’ desire to claim a product (since no method steps are present). This dichotomy is additional evidence of a hybrid claim since its unclear as to which §101 subject matter category Applicants intend to claim.

Examiner’s Second Alternative Argument: Controlling Case Law Requires Method Claims to Recite an Additional Method Step

27. In *Ex parte Erlich*, the examiner rejected dependent claims 6 and 7 “under 35 U.S.C. 112 second paragraph as being incomplete in that they fail to recite a positive method step.” *Erlich* at 1017. Appellant argued “that these claims need not specifically outline any process steps.” *Id.*

On appeal, the Board of Patent Appeals and Inferences (“the Board”) affirmed the examiner and held that:

While we agree with appellants that the claims need not recite all of the operating details, we do find that a method claim should at least recite a positive, active step(s) so that the claim will set out and circumscribe a particular area with a

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reasonable degree of precision and particularity . . . and make it clear what subject matter these claims encompass, as well as making clear the subject matter from which others would be precluded *Id* (citations and quotations omitted).

As Applicants have pointed out, *Erlich* was concerned with “use claims.” While it appears Applicants’ method claims are directed to a method of making communications since communication is the main step in claim 11, the rationale from *Erlich*’s use claims is equally applied to Applicants’ method of making claims. The purpose of making the 112 2nd paragraph rejection by both the Examiner in this case and the examiner in *Erlich* is to require a positive, active step so that “the claim will set out and circumscribe a particular area with a reasonable degree of precision and particularity” *Erlich* at 1017.

The Examiner notes that the Board in *Erlich* stated “a method claim should recite a positive active step” and not ‘a use claim should recite an active positive step.’ If the Board so desired the holding to be limited to use claims, they would have clearly stated so.⁴

Furthermore, since the Board requires a positive active step in claim directed towards a method of using, the Examiner sees no reason whatsoever for not having the same requirement in a method of making claim. The distinction between a method of making and method of using is

⁴ The Examiner notes that *Ex parte Erlich* is binding precedent on the Examiner and on all Board panels consisting of three members since a published Board opinion may be overruled only by the Board sitting en banc, or by an expanded panel of the Board (i.e., one with more than three members). See *Ex parte Holt*, 19 USPQ2d 1211, 1214 (B.P.A.I. 1991).

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immaterial and of little value when the primary concern in any method claim is ascertaining the metes and bounds of the claim.

Applicants are reminded of the purpose of the claims, “The purpose of claims is not to explain the technology or how it works, but to state the legal boundaries of the patent grant.” *S3 Inc. v. nVIDIA Corp.*, 259 F.3d 1364, 1369, 59 USPQ2d 1745, 1748 (Fed. Cir. 2001) (citations omitted).

Applicants’ Arguments:

28. It is the Examiner’s understanding that its Applicants position that the method step required in claim 12 is in fact found in claim 11. In other words, since 35 U.S.C. 112 4th paragraph expressly states, “A claim in dependent form shall be construed to incorporate by reference all the limitations of the claim to which it refers” the method steps in claim 11 are incorporated by reference into claim 12. This incorporation by reference theory seems exceedingly persuasive on its face.

In response, The Examiner summarizes with the following 4 points:

29. First and most importantly, 35 U.S.C. 112 4th paragraph expressly requires a dependent claim to “then specify a further limitation of the subject matter claimed.” If Applicants choose a method as their claimed invention, then 35 U.S.C. 112 4th paragraph demands that Applicants’ dependent claims further limit their claimed method. Since a method claim must contain at least

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one method step, Applicants' dependent method claims must also contain at least one method step.

30. Second, case law has clearly made exceptions to the incorporation by reference theory in rejecting hybrid claims as noted above. While the Examiner recognizes certain judicially created exceptions which allow a machine claim to be dependent upon a process claim, there is no blanket rule allowing this practice. It is the Examiner's understanding that Applicants are urging a reviewing body to adopt precisely such a blanket rule allowing any product claim to depend upon a process claim. The Examiner respectfully urges a reviewing body to reject this theory.

31. Third, it is clear from the above discussions that Applicants and the Examiner disagree on the drawing requirements under 37 CFR 1.83. Part of this disagreement is directly related to the lack of a method step in the dependent method claims. By requiring a dependent method claim to recite a positive active step, it would be perfectly clear what limitations are positively recited in the claim. Without requiring the dependent method claim to recite a positive active step, disagreements about what must be shown in the drawings are, and will continue to be, common place since the scope of a dependent method claim remains unavoidably unclear.

32. Finally, as stated earlier, the purpose of the claims is to delineate for the public the metes and bounds of Applicants' authorized monopoly. To this end, clarity and precision in the claims is of utmost importance. The burden requiring Applicants to recite at least one method step in a dependent method claim is extremely small when balanced with public's right to have claims

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distinctly pointing out and distinctly claiming the subject matter which Applicants regard as their invention.

Conclusion

33. Applicants' amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicants are reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

34. The prior art made of record and not relied upon is considered pertinent to Applicant's disclosure includes the following: Suzuki (U.S. 6,129,274); Postrel et. al. (U.S. 6,003,008); and Albert et. al. (U.S. 5,991,410).

35. All MPEP sections cited within are from the Manual of Patent Examining Procedure (MPEP) Eighth Edition, August 2001 unless expressly noted otherwise.

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36. The art unit and technology center for this application has changed. The new art unit is 3627 in technology center 3600. So that papers may be properly matched, please indicated the new art unit on any paper submitted with this application.

37. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Andrew J. Fischer whose telephone number is (703) 305-0292.

 8/26/02

ROBERT P. OLSZEWSKI
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 3600


ANDREW J. FISCHER
PATENT EXAMINER
8/26/02

AJF
August 26, 2002